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IN THE

Supreme Court of the United States

DURA PHARMACEUTICALS, INC., *et al.*,

Petitioners,

v.

MICHAEL BROUDO, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* AND BRIEF FOR THE SECURITIES INDUSTRY ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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MOTION OF THE SECURITIES INDUSTRY ASSOCIATION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

The Securities Industry Association ("SIA") hereby requests, pursuant to Rule 37.2 of the Rules of this Court, leave to file the accompanying brief as *amicus curiae* in support of Petitioners. SIA obtained the consent of the Petitioners. Petitioners' letter of consent has been filed with the Clerk of the Court. Respondents, however, withheld their consent from the filing of this brief in support of the Petition.

SIA offers this brief because the issues to be decided affect the interests of the SIA and its members. SIA was established in 1972 to represent the shared interests of nearly 600 securities firms. SIA member-firms (including investment banks, broker-dealers, and mutual fund companies) are active in all U.S. and foreign markets and in all phases of corporate and public finance. The SIA has previously filed *amici* briefs with the Court in cases concerning civil liability under the

federal securities laws. See, *e.g.*, *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002); *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350 (1991); *Rodriguez De Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477 (1989); *Shearson/American Express Inc.* v. *McMahon*, 482 U.S. 220 (1987).

The question presented by this case – the proper test for establishing "loss causation" in securities fraud cases – is an issue of recurring importance for the securities industry and investors. It is critically important to the SIA that member firms not be converted into guarantors that investments will be successful where no causal connection exists between the misrepresentation alleged and a security's decline in price. It is equally important that a uniform rule of federal law be applied across the country. The vast majority of SIA members have nationwide operations, and a patchwork of rules undermines the Congressional policy favoring national markets. The SIA therefore has a vital interest in the issue presented in this case and the SIA's views can assist the Court in deciding whether certiorari should be granted.

For the foregoing reasons, SIA's Motion for Leave to File a Brief as *Amicus Curiae* in support of Petitioners should be granted.

Respectfully submitted,

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INTEREST OF THE *AMICUS CURIAE*[1]

The Securities Industry Association ("SIA"), established in 1972 through the merger of the Association of Stock Exchange Firms and the Investment Banker's Association, brings together the shared interests of nearly 600 securities firms to accomplish common goals. SIA member-firms (including investment banks, broker-dealers, and mutual fund companies) are active in all U.S. and foreign markets and in all phases of corporate and public finance. According to the Bureau of Labor Statistics, the U.S. securities industry employs more than 800,000 individuals. Industry personnel manage the accounts of nearly 93-million investors directly and indirectly through corporate, thrift, and pension plans. In 2002, the industry generated $222 billion in domestic revenue and $304 billion in global revenues. (More information about SIA is available on its home page: www.sia.com).

The question presented by this case – the proper test for establishing "loss causation" in securities fraud cases – is an issue of recurring importance for the securities industry and investors. It is critically important to the SIA that member firms not be converted into guarantors that investments will be successful where no causal connection exists between the misrepresentation alleged and a security's decline in price. It is equally important that a uniform rule of federal law be applied across the country. The vast majority of SIA members have nationwide operations, and a patchwork of rules undermines the Congressional policy favoring national markets. The SIA therefore has a vital interest in the issue presented in this case and the SIA's views can assist the Court in deciding whether certiorari should be granted.

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[1] Pursuant to this Court's Rule 37.6, *amicus* Securities Industry Association states that no counsel for any party authored this brief in whole or in part, and no person or entity made a monetary contribution to the preparation or submission of the brief.

INTRODUCTION

Compelling reasons warrant granting certiorari. The petition presents an acknowledged conflict between a growing number of circuits. The conflict concerns a central issue – loss causation – that is contested in the vast majority of securities cases. There are hundreds of filed securities cases in the pipeline in which loss causation is a critical issue. Only a decision by this Court will resolve this recurring and important issue.

REASONS FOR GRANTING THE PETITION

I. THIS CASE PRESENTS AN ACKNOWLEDGED, ESTABLISHED, AND LONGSTANDING CIRCUIT SPLIT THAT WILL NOT BE RESOLVED WITHOUT INTERVENTION BY THIS COURT.

The Ninth Circuit's decision below acknowledges, extends, and perpetuates a longstanding conflict among the circuits on the proper test for establishing the "loss causation" element of a claim under Rule 10b-5 of the Securities Exchange Act of 1934. "Loss causation" is "the causal link between the alleged misconduct and the economic harm ultimately suffered by the plaintiff." *Emergent Capital Inv. Mgmt., LLC* v. *Stonepath Group, Inc.*, 343 F.3d 189, 197 (2d Cir. 2003). "Loss causation" is the securities law equivalent to the common law tort rule of proximate cause. *Id.* ("We have often compared loss causation to the tort law concept of proximate cause"); *Bastian* v. *Petren Res. Corp.*, 892 F.2d 680, 683 (7th Cir. 1990) ("[W]hat securities lawyers call 'loss causation' *is* the standard common law fraud rule".) "The proximate cause [or loss causation] element of the claim prevents section 10(b) and Rule 10b-5 from becoming a system of investor insurance." *Rousseff* v. *E.F. Hutton Co.*, 843 F.2d 1326, 1329 (11th Cir. 1988).

Under the Ninth Circuit's decision, a plaintiff in a securities fraud case satisfies the "loss causation" element of a claim under Rule 10b-5 merely by pleading and proving that the company's share price was inflated when the plaintiff purchased shares. *See* Pet. App. 9a ("[L]oss causation does not require pleading a stock price drop following a corrective disclosure or otherwise. It merely requires pleading that the price at the time of purchase was overstated and sufficient identification of the cause."). The Eighth Circuit also follows this approach. *Abbey* v. *Control Data Corp. (In re Control Data Corp. Sec. Litig.)*, 933 F.2d 616, 619-20 (8th Cir. 1991); *Gebhardt* v. *ConAgra Foods, Inc.*, 335 F.3d 824, 831 (8th Cir. 2003).

In the Second, Third, Seventh, and Eleventh Circuits, by contrast, the plaintiff must allege and prove that the company's share price declined when the allegedly concealed information was disclosed, and any damages are limited to that decline. *Emergent Capital*, 343 F.3d at 198-99; *Semerenko* v. *Cendant Corp.*, 223 F.3d 165, 184-85 (3d Cir. 2000); *Bastian*, 892 F.2d at 684-85; *First Interstate Bank of Nev., N.A.* v. *Chapman & Cutler*, 837 F.2d 775, 779-80 (7th Cir. 1988); and *Robbins* v. *Koger Props., Inc.*, 116 F.3d 1441, 1447-49 (11th Cir. 1997).

An illustration will demonstrate the vastly different outcomes under the conflicting approaches. Suppose plaintiff P buys $200 of stock in defendant D. As time passes, the value of P's investment declines to $20. *After* this decline, D announces the restatement of an accounting item. After this announcement, the value of P's shares remains at $20. P brings a lawsuit under Rule 10b-5. In the Second, Third, Seventh, and Eleventh Circuits, the no-decline case is dismissed on a Rule 12(b)(6) motion.[2] In contrast, in the Ninth and Eighth Circuits, P's lawyers bring a class action

[2] Of course, in every circuit, loss causation properly may be alleged in the classic situation when the announcement causes a share price decline.

and hire an expert who opines on how much of the price P paid was "inflated" because of the undisclosed accounting issue. In these circuits, the no-decline case likely results in discovery, summary judgment motions, often settlement, and sometimes trial. Across the mass of securities cases, the difference between the two conflicting approaches affects hundreds of millions of dollars in damage awards, settlements, attorneys' fees, and costs imposed on the federal judicial system.

As the 1997-2003 dates of the cited cases on both sides of this conflict demonstrate, see *supra*, at 3, the circuit courts have found nothing in the Private Securities Litigation Reform Act of 1995 (or any subsequent legislation) that resolves this conflict. Only a decision by this Court will resolve the doctrinal divide.

This conflict has been expressly acknowledged by the circuits for at least six years. The Eleventh Circuit acknowledged the conflict in 1997 in *Robbins*. 116 F.3d at 1448 (noting that the Eighth and Ninth Circuits have held that "plaintiffs establish loss causation if they have shown that the price on the date of purchase was inflated because of the misrepresentation," but holding that "we refuse to do so here") (internal quotation marks omitted). And in the decision below, the Ninth Circuit expressly acknowledged that its holding conflicts with decisions of the Third and Eleventh Circuits. Pet. App. 9a n.4 ("By contrast, other circuits are less favorable to plaintiffs and do require demonstration of a corrective disclosure followed by a stock price drop to be alleged in the complaint.") (citing *Semerenko* and *Robbins*). See also *In re Initial Pub. Offering Sec. Litig.*, No. 21 MC 92 (SAS), 2003 WL 23096875, at *2 (S.D.N.Y. Dec. 31, 2003) ("The Courts of Appeals are deeply divided on this question. The Eighth and Ninth circuits have recently reaffirmed their holding that allegations of artificial inflation, alone, *are* sufficient. The Third and the Eleventh circuits have held otherwise.") (footnotes omitted); David S.

Escoffery, Note, *A Winning Approach to Loss Causation Under Rule 10b-5 in Light of the Private Securities Litigation Reform Act of 1995 ("PSLRA")*, 68 Fordham L. Rev. 1781, 1797-1809 (2000) (discussing the circuit conflict).

The Ninth Circuit's decision perpetuates this acknowledged conflict. In addition, the recent vintage of the court of appeals' decisions perpetuating the conflict demonstrates that only action by this Court will resolve the conflict over "loss causation" in securities fraud cases.

II. THE CIRCUIT SPLIT NEEDS TO BE RESOLVED BECAUSE IT PRESENTS A FREQUENTLY-LITIGATED ISSUE THAT SIGNIFICANTLY AFFECTS THE SECURITIES INDUSTRY AND INVESTORS.

The Court should resolve the circuit conflict because the proper standard for loss causation is a recurring and frequently-litigated issue in securities fraud cases. Securities lawsuits are proliferating as a result of the broad stock market declines between early 2000 and March 2003. See, *e.g.*, Cornerstone Research, *Securities Class Action Case Filings – 2002: A Year in Review* 2 (2003), *available at* http://securities.stanford.edu/clearinghouse_research/2002_YIR/2002_yir.pdf (reporting that the 224 securities class action suits filed in 2002 was "31 percent greater than the number of cases filed in 2001 [171] and the second highest of any year since the passing of the Private Securities Litigation Reform Act of 1995") (brackets in original); *id.* at 17 (noting that 85 percent of the cases filed in 2002 involved Rule 10b-5 claims). Accordingly, there are many securities cases in the federal court pipeline that are affected by this conflict. This Court should resolve the conflict before numerous cases in the pipeline are decided incorrectly and judicial resources are wasted.

The lack of a uniform rule on loss causation is intolerable. As matters now stand, litigants in different circuits are subject

to different legal standards with respect to this outcome determinative issue. Indeed, the Ninth Circuit's expansion of the conflict is particularly significant because it means that the circuits in which the largest number of securities fraud cases are filed now have conflicting rules. See *id.* at 14 (the top circuits in number of filings have been the Second, Third, Ninth and Eleventh Circuits). The inconsistent legal standards in those circuits result in diametrically opposed outcomes for indistinguishable cases. It is therefore important that the Court resolve the conflict before many more cases are wrongly decided, resulting in either inappropriate liability imposed on defendants or no redress for legitimate victims.

Moreover, the Court should take this case to review the conflict because the class action plaintiffs' bar has shown that it is not likely to seek certiorari when it loses on loss causation so long as one or more circuits favors its position. In *Robbins*, the Eleventh Circuit reversed an $81 million class action judgment for the plaintiff class and acknowledged a conflict with the Ninth Circuit, 116 F.3d at 1446, 1448. Nonetheless, the nation's leading plaintiffs' class-action law firm did not seek certiorari in *Robbins*. Rather, as long as the plaintiffs' bar can forum shop because some circuit has favorable loss causation rules (and the plaintiffs' bar can bring new, nationwide class actions in a district court within the circuit), the plaintiffs' bar has every incentive to leave the conflict festering.

The interlocutory posture of this case does not render it an inappropriate vehicle for resolving this important circuit conflict. This Court has granted certiorari to resolve important Rule 10b-5 issues in other cases involving circuit court reversals of Rule 12(b)(6) dismissals of complaints. *Santa Fe Indus., Inc.* v. *Green*, 430 U.S. 462, 469 (1977) (establishing that Rule 10b-5 does not cover mismanagement or breach of fiduciary duty); *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 727 (1975) (establishing that

private Rule 10b-5 plaintiff must be a purchaser or seller). The proper standard for loss causation is a pure question of law that can be fully addressed at the Rule 12(b)(6) stage. Indeed, in this case, the district court used the proper standard and granted petitioner's Rule 12(b)(6) motion. Pet. App. 40a.

Amicus believes that it is particularly important for this Court to grant review to establish a loss causation rule that results in the dismissal of cases where there is no injury at the Rule 12(b)(6) motion to dismiss stage. This Court has recognized that "litigation under Rule 10b-5 presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general." *Blue Chip Stamps*, 421 U.S. at 739. As a result, defendants "expend large sums even for pretrial defense and the negotiation of settlements" when cases without merit are not dismissed at an appropriately early stage. *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 189 (1994). This Court has noted that the "ripple effects" of such "uncertainty and excessive litigation" under Rule 10b-5 can include increased "litigation and settlement costs," which may be passed on to companies and their investors, and which can make professionals reluctant to work with newer and smaller companies. *Id.*[3]

The real-world effects of the unresolved conflict on loss causation extend beyond the impact on particular litigants. *Amicus* believes the standard set by the Ninth Circuit will impose liability when no damage has been caused by the defendants. This gives securities issuers, investment firms, and professionals a strong disincentive to undertake or

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[3] The absence of a private civil remedy under the federal securities laws in cases where the plaintiff has suffered no injury does not affect federal and state administrative and criminal remedies that are otherwise available against wrongdoers even when there is no financial loss. *See Bastian*, 892 F.2d at 685 ("Defrauders are a bad lot and should be punished, but Rule 10b-5 does not make them insurers against national economic calamities.").

participate in securities transactions beneficial to our market economy. The resulting suppression of a robust securities market is harmful to the entire economy and is in nobody's interest. See *Bastian*, 892 F.2d at 685 ("No social purpose would be served by encouraging everyone who suffers an investment loss because of an unanticipated change in market conditions to pick through offering memoranda with a fine-tooth comb in the hope of uncovering a misrepresentation.").

At present, the loss causation standard is set on a circuit-by-circuit basis and different courts have set opposing rules. The resulting lack of uniformity causes inconsistent outcomes for litigants and uncertainty for participants in the securities markets. The Court should resolve the issue presented in this case now in order to set a clear rule and avoid the undesirable economic effects fostered by the acknowledged circuit split.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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